

CCASE:

UMWA V. SOL (MSHA)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC

September 29, 1983

UNITED MINE WORKERS OF
AMERICA

v.

Docket No. LAKE 82-70-R

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1976 & Supp. V 1981). The issue presented is whether the United Mine Workers of America ("UMWA"), as a representative of the miners, has statutory authority under section 105(d) of the Mine Act, 30 U.S.C. • 815(d), to contest the Secretary of Labor's vacation of a section 104(d)(1) withdrawal order issued to the operator. 30 U.S.C. • 814(d)(1). For the reasons below, we hold that under section 105(d) miners and their representatives do not have such a statutory right.

The facts of the case are as follows. On March 15, 1982, a Department of Labor, Mine Safety and Health Administration ("MSHA") inspector issued an order of withdrawal under section 104(d)(1) of the Mine Act to the Saginaw Mining Company. The withdrawal order was terminated on the following day by a second MSHA inspector. On March 19 1982, a third MSHA inspector (identified as an "Inspector Supervisor) vacated the section 104(d)(1) order on the ground that it had been erroneously issued.

On April 9, 1982, the UMWA (District 6), proceeding as the representative of the miners, filed a notice of contest with this independent Commission under section 105(d) challenging the Secretary's action of vacating the withdrawal order. The UMWA requested that the Commission reinstate the order. The Secretary, in turn, filed a motion to dismiss the UMWA's notice of contest on the ground that the UMWA did not have authority under the Mine Act to challenge the Secretary's action of vacating the withdrawal order. 1/ On May 21, 1982, the Chief Administrative Law Judge issued an order dismissing the UMWA's notice of contest. 4 FMSHRC 921 (May 1982)(ALJ). The judge concluded that the UMWA does not have a statutory right under the Mine Act to contest the vacation of the

withdrawal order. We agree.

1/The Saginaw Mining Company did not contest any of the Secretary's actions nor did it intervene in this case.

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Section 105(d) of the Act sets forth the various rights that operators and miners have with respect to initiating Commission review of Secretarial enforcement actions. It provides, in part:

If, within 30 days of receipt thereof, an operator of coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification and the Commission shall afford an opportunity for a hearing....

30 U.S.C. • 815(d)(emphasis added).

Section 105(d) is clear and unambiguous in setting forth the extent to which miners and their representatives may initiate challenges to the Secretary's enforcement of the Mine Act. *UMWA v. Secretary*, 5 FMSHRC 807 (CENT 81-223-R, May 11, 1983), pet. for review filed, No. 83-1519, D.C. Cir., May 13, 1983 ("*UMWA v. Secretary I*").

2/ Concerning withdrawal orders, section 105(d) grants miners the right to contest the "issuance, modification, or termination" of any order issued under section 104. It does not, however, grant miners the right to contest the Secretary's action of "vacating" a section 104 withdrawal order.

We find the omission of the term "vacating" in section 105(d) to be fatal to the UMWA's claim that it has the statutory right to initiate the present proceeding. The "vacation" of a citation or withdrawal order is a term of art under the Mine Act and Congress was fully aware of its discrete meaning. For example, in section 104(h) of the Act Congress provided that "[a]ny citation or order issued under this section shall remain in effect until modified, terminated or vacated by the Secretary, ... or modified,

2/ We stated in *UMWA v. Secretary I* that the language of section 105(d) was unambiguous in holding that miners do not have the statutory authority under the Mine Act to initiate review of citations issued by the Secretary through the filing of a notice of contest. We also noted that our finding section 105(d) to be ambiguous in *Energy Fuels Corp.*, 1 FMSHRC 299 (May 1979) was inapposite to the question of miners' rights to contest under section 105(d). because our holding in *Energy Fuels Corp.* was directed to the unrelated question of whether an operator may contest a citation prior to the Secretary's proposing a penalty. 5 FMSHRC at 811, n.5.

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terminated or vacated by the Commission or the courts...." 30 U.S.C.

□ 814(h)(emphasis added). 3/ Furthermore, the latter portion of section 105(d) itself provides that "the Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order ... affirming, modifying, or vacating the Secretary's citation, order or proposed penalty...." 30 U.S.C. • 815(d)(emphasis added). Therefore, if Congress intended for miners to have the right to contest the Secretary's action of vacating a section 104 withdrawal order, that right would have been specifically provided for in section 105(d). In the face of Congress' evident recognition of the distinctions between the issuance, modification, termination and vacation of citations and orders, and its failure to provide a right to contest the vacation of an order, we do not have the prerogative to provide such a right. See *UMWA v. Secretary I*, 5 FMSHRC at 515. 4/ We emphasize that the failure of Congress to provide for the right asserted here does not leave affected miners without a remedy in the situation presented. Under section 103(g)(1) of the Act miners can request an immediate inspection by MSHA if they have reasonable grounds to believe that a violation of the Act or a standard or an imminent danger exists. A "special inspection" is thereafter required "as soon as possible to determine if such violation or danger exists...." 30 U.S.C. • 813(g)(1). If upon reinspection the inspector determines that no violation exists, miners may seek further Secretarial review of that determination. 30 C.F.R. Part 43. See also, 30 U.S.C. • 813(g)(2).

3/ In light of the language of section 104(h) distinguishing between the issuance and the vacation of citations and orders, we reject the assertion that the vacation order should be contestable under section 105(d) because it is also "issued." This approach would render Congress' use of the terms "modification," "termination" and "vacation" surplusage and would ignore the commonly understood discrete meanings of the terms. 4/ We note that neither party has cited any legislative history directly bearing on the asserted right,

nor have we discovered any.

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Accordingly, we hold that under section 105(d) of the 1977 Mine Act miners and their representatives do not have statutory authority to contest the Secretary's action of vacating a section 104(d)(1) withdrawal order. 5/ The judge's order dismissing the UMWA's notice of contest in this case is, therefore, affirmed.

L. Clair Nelson, Commissioner

5/ The present case involves the interpretation of section 105(d) of the 1977 Mine Act. The decision in *Eastern Associated Coal Corp.*, 4 IBMA 298 (1975), addressed the Board of Mine Operations Appeals' interpretation of section 105(a)(1) of the 1969 Coal Act. The sections are not identical and the rights created by each are, quite simply, different. Therefore, the dissent's extensive reliance on the Board's decision in *Eastern* is misplaced. Furthermore, *Eastern* directly concerned the continued viability of an operator's challenge to a withdrawal order that subsequently had been vacated by the Secretary. The essential holding in *Eastern* was that under the 1969 Act the Secretary could not extinguish rights to review of an underlying order by the expedient of vacating the order. *Eastern* did not present any challenge to the vacation order itself and, therefore, the Board's comments as to the reviewability of vacation orders under the 1969 Act was dicta. Nor is any issue presented as to the reviewability of a unilateral attempt by the Secretary to vacate a citation or order after a proper notice of contest triggering Commission jurisdiction is filed. See, e.g., *Climax Molybdenum Co.*, 2 FMSHRC 2748 (October 1980), *aff'd*, No. 80-2187, 10th Cir., March 21, 1983; *Kocher Coal Co.*, 4 FMSHRC 2123 (December 1982).

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Commissioner Lawson dissenting:

The reasoning of the majority in this case substantially parallels that of its opinion in *UMWA v. Secretary*, 5 FMSHRC. 807 (May 11, 1983), *pet. for review filed*, No. 83-1519, D.C. Cir., May 13, 1983). I dissent here also, for reasons similar to those expressed by me in that case.

As the majority has conceded, the miner or his or her representative can contest "the issuance, modification, or termination of any order issued under section 104." Slip op. at 2. It does not follow that, under section 104(h) of the Act, which authorizes the Secretary, the Commission or the courts to modify, terminate or vacate a citation or order, that Congress must have intended to distinguish between "vacation" and "termination" of an order.

It is unquestioned that an adversely affected miner can initiate review of the vacation of any order by the Commission in the Court of

Appeals.^{1/} Since those Commission orders are subject to review, Congress could hardly have intended to provide insulation from review for the Secretary from his vacation of orders, nor does the language of the statute preclude such challenge.

Miners are affected no differently by a "terminated" or a "vacated" withdrawal order--the protection mandated by the Act vanishes with the issuance of such an order. In this case, the UMWA asserts that the Secretary's inspector(s) improperly conducted this mine roof inspection. Roof falls in underground mines are and have been the leading cause of mine deaths for many years. ^{2/} The majority would nevertheless deny review of vacated, but not terminated orders. For purposes of review, importantly, protection of the miner, I find no definitional distinction between termination and vacation of an order. Indeed, as the Board of Mine Operations Appeals held in *Eastern Associated Coal Corp.*, 4 IBMA 298, 304 (1975):
Insofar as the right of review is concerned, vacating an order has no more implication than the termination of an order. For review purposes, a vacated order is a terminated order. *Id.* at 306.

^{1/} "Any person adversely affected or aggrieved by an order of the Commission issued under this Act may obtain a review of such order in any United States Court of Appeals . . ." 30 U.S.C.A. 816(a).

^{2/} Indeed, fatalities as the result of roof falls between January 1 to June 4, 1982 had dramatically increased; twenty-nine miners died during that period, compared with nine deaths in 1981, and twelve deaths in 1980 for the same time period. *Daily Fatality Report*, U.S. Dept. of Labor, MSHA, June 4, 1982 and June 4, 1980.

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An example makes clear that the majority's view fails to conform to either the language or the purpose of the Act. Under the Act a miner can rely upon the protection of a withdrawal or other protective order for thirty days, with no need to seek review thereof during that period. However, the reversal of *Eastern* (supra), will now permit the Secretary to vacate an order on the thirty-first day, and thus extinguish the right of the miner to seek review of the order. The Secretary's BMOA in *Eastern*, however, recognized the problem presented and protected this review for both the miner and the operator: Section 105(a) of the Act grants both the operator and representative of the miners the right to seek review of any order or its modification or termination, issued pursuant to section 104. We hold that this right of review must be safeguarded and cannot be frustrated by unilateral action of MESA. In the instant case vacation of the Order, as defined by MESA, would deprive both the

operator and the representative of miners of any opportunity to seek Secretarial review of the validity of a section 104 withdrawal order as and when issued or the validity of a subsequent order modifying or terminating such Order. We cannot be unmindful of the consequences which flow from the issuance of an order of withdrawal under section 104 of the Act, particularly as seen in the provisions of sections 104(c) and 110 of the Act, as well as the immediate loss of production to the operator, whether or not issuance of the order was improvident. We believe such action and any subsequent action by MESA with respect to that order, be it modification, termination, or vacation, is reviewable pursuant to section 105 of the Act, if such review is timely sought by the operator or representative of the miners. We do not hold that MESA has no authority to vacate an order, for in many instances this may be the most expeditious method of accomplishing a desired result and it may in many instances be the preferable remedy for the operator. What we do hold is that MESA by "vacating" an order may not thereby deny an operator or representative of miners the right of review of the basic order or any subsequent orders.

That a mistaken or improper vacation of a withdrawal order could be fatal or crippling to a miner is so evident as to need no embellishment. It is noteworthy that three different mine inspectors were involved in this case in issuing, terminating, and finally vacating the withdrawal order now under consideration. The suggestion that foreclosing review of "vacated" orders "does not leave affected miners without a remedy" (slip op. at 3) derives from sections 103(g)(1) & (2) of the Act. These statutory sections, unfortunately, merely provide for after-the-fact "informal" review by the Secretary of his own actions, with no appeal therefrom. This obviously fails to provide a meaningful, much less independent, adjudicatory hearing, since the Secretary will be reviewing his own decision, and reversal thereof is not realistically to be anticipated. Section 103(g)(1) & (g)(2). This internal administrative review

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by the Secretary (apparently largely unutilized), thus fails to provide the due process so evidently required by the law and the balance of the Act. As this Commission noted in *Sec. ex rel. Gooslin v. Kentucky Carbon*, 3 FMSHRC 1707, 1712 (July 1981), in providing an operator with review and a hearing under section 105(c)(2) as a matter of due process, even though the statute was silent as to any right therefor:

Due process contemplates fundamental fairness. As the

Supreme Court stated in *Boddie v. Connecticut*, 401 U.S. 371 (1971):

What the Constitution does require is 'an opportunity ... granted, at a meaningful time and in a meaningful manner,' ... 'for [a] hearing appropriate to the nature of the case,' ... [401 U.S. at 378; Court's emphasis; citations omitted.]

See also, e.g., *Armstrong v. Munzo*, 380 U.S. 545, 552 (1965); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

Perhaps of even more importance, the majority's acceptance of the Secretary's views in this case permits him to frustrate the miners' challenges to section 104 withdrawal orders simply by vacating these--or any other--orders rather than terminating or even modifying such, thus evading any challenge by the miners' under section 105(d). It can hardly be maintained that modification of an order, which obviously results in at least some remaining protection for the miner, is more review worthy than vacating of the order. That is nevertheless the consequence of the position adopted by the majority today.

Nor would allowing miners' representative to contest the vacation of a section 104(d)(1) order undermine the Secretary's prosecutorial discretion, since 105(d) already allows miners to challenge other Secretarial enforcement actions, (e.g., the "issuance, modification or termination" of section 104 withdrawal orders; see also section 107(e)(1)). Furthermore, the logical corollary to the miner's right to contest the issuance of a section 104 order, is the right to contest the vacating of that order. Perhaps the miners' representative in this case should have labeled its notice of April 9th as a contest of the termination of the challenged order, given the semantic analysis of the majority. Indeed, that is the reality of the situation presented. For, as stated in the dissent to *UMWA v. Secretary I*, (*supra*):

The adversary system is, in my view, entitled to at least the same measure of respect as reliance on "prosecutorial discretion" and indeed presents preferable possibilities for the parties to challenge either abusive enforcement or lack of enforcement. For that reason, too, permitting the miner or miner's representative to fully participate and litigate issues such as those presented in this case appears to be far more in accord with the purpose and intent of the Act, certainly as reflected in the legislative history, than the denial to the most affected parties, the miners, of the right to review Secretarial action or inaction even if limited to an abuse of discretion. Miners, too, must be assured that the Secretary is in compliance

with the Act.

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The Secretary here maintains that he erred in issuing the challenged withdrawal order, but that his order recognizing that "error" is beyond review. The vacation objected to by the petitioner herein was accomplished by the issuance of the Secretary's order of March 19, 1982, pursuant to the authority of section 104(h) of the Act. And, as is undisputed, a miner's representative can contest the issuance of any order issued under section 104. This construction is clearly supported by the language of the statute; indeed, neither the majority nor the Secretary contend to the contrary, and is further confirmed by the issuance of that vacating order on MSHA Form 7000-3a, designating the action taken as an "order."

This withdrawal order was issued on March 15th, terminated on March 16th and vacated on March 19th. The miners' notice of contest was filed on April 9th--timely as to the issuance, termination and vacation of the involved order under section 105(d). This Commission should therefore construe this notice of contest so "as to do substantial justice", allowing that contest notice as a challenge to the termination of the withdrawal order. 3/

Finally, since section 105(d) does not preclude a miner's contest of a vacation of an order, interpreting that section as providing that for review purposes a vacated order is a terminated order would be consistent with the remedial and participatory enforcement pattern of the Mine Act, which encourages miners to participate in safety and health matters. 4/

I would, therefore, for the reasons expressed both herein and in my dissent in *UMWA v. Secretary I*, reverse the decision below and remand for consideration on the merits of the issues presented by the Secretary's vacation of this withdrawal order.

A. E. Lawson, Commissioner

3/ Rule 8(f) of the Federal Rules of Civil Procedure provides: CONSTRUCTION OF PLEADINGS. All Pleadings shall be so construed as to do substantial justice.

See the Commission's Rules of Procedure 29 C.F.R. 2700.1.

4/ There is substantial precedent construing the 1969 Act--a fortiori applicable to the 1977 Act--which holds that between two possible interpretations of the Act, the one that promotes safety must be preferred. See District 6, *UMWA v. IBMA*, 562 F.2d 1260, 1265 (D.C. Cir. 1977). Accord, *UMWA v. Kleppe*, 532 F.2d 1403, 1406 (D.C. Cir. 1976), cert. denied, 429 U.S. 858 (1976); *Munsey v. Morton*, 507 F.2d 735 (D.C. Cir. 1978); *Phillips v. IBMA*, 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975). It follows that the interpretation of section 105(d) that best promotes safety is one

that permits miner participation.

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Distribution

Michael A. McCord, Esq.

Office of the Solicitor

U.S. Department of Labor

4015 Wilson Blvd.

Arlington, Virginia 22203

Thomas M. Myers, Esq.

United Mine Workers of America

District 6

56000 Dilles Bottom

Shadyside, Ohio 43947

Mr. R.A. Thomas, Secretary

Saginaw Mining Co.

1200 Hanna Building

Cleveland, Ohio 44115

Mr. John J. Kirn, Asst. Sec.

Saginaw Mining Company

1100 Superior Avenue

Cleveland, Ohio 44114

Chief Administrative Law Judge Paul Merlin

Federal Mine Safety & Health Review Commission

1730 K Street, N.W.

Washington, D.C. 20006